In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 228

WAVERLY C. BROADWELL AND NANCY BROADWELL, HIS WIFE, AND DOHN BROADWELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In their 1959 income tax returns petitioners[1] reported the sale of certain parcels of property owned by them as tenants in common for a gross sales price of $83,200. They claimed certain deductions from the gross sales price and purported to elect the installment method of reporting the resulting gain (R. 9–10, 21–22).[2] After audit the Internal Revenue Service advised the taxpayers by notice of deficiency that their returns did not substantiate either the

[1] Petitioners are two brothers. The wife of one of the brothers was joined solely because she is a party to her husband's joint income tax return.

[2] "R" references are to the printed appendix filed by the petitioners in the court of appeals.

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claimed cost basis, the claimed expenses of sale or the petitioners' qualification to use the installment method of reporting. The Service thus increased each brother's 1959 taxable income by one-half of the gross sales price, with resulting proposed deficiencies of $16,921.87 and $24,466.19, respectively (R. 7–8, 19–20). The taxpayers did not petition the Tax Court for a redetermination of the proposed 1959 deficiencies.[3] Therefore the deficiencies were assessed against them and, after demand, automatically became liens on all of their property (Sections 6213, 6303, 6321, Internal Revenue Code of 1954).

Petitioners then filed consolidated actions in the district court asserting that the tax liens constituted a cloud upon the title to their property, relying on 28 U.S.C. 2410 (reproduced on pages B3–5 of the petition) as a basis for jurisdiction and as a waiver of sovereign immunity. Petitioners asked the district court to temporarily enjoin the government from attempting to collect the assessments, to review the merits of the deficiency on which the assessments were based and to permanently enjoin the government from collecting the taxes. On the government's motion the district court dismissed the complaints on the ground that:

> In light of the legislative history of Section 2410(a) it is apparent that the consent of the government, given under that section, does not extend to a taxpayer's attack on the merits of

[3] The same notices of deficiency also covered the year 1960 showing deficiencies for that year as well. The taxpayers filed petitions in the Tax Court with respect to 1960 only. See Tax Court Docket Nos. 408–64 and 400–64.

> a tax assessment through the vehicle of a suit to quiet title. [R. 28.]

The court of appeals affirmed, stating "that 28 USC 2410 is not available for the purpose for which it is now invoked" (Pet. A2).

This Court has recently given exhaustive consideration to the various remedies available to an aggrieved taxpayer. In *Flora* v. *United States,* 362 U.S. 145, the Court held that a taxpayer can initiate judicial review on the merits of his tax controversy in either of two ways: He can petition the Tax Court within 90 days after receiving a notice of deficiency, in which event the government is precluded from assessing or attempting to collect the tax during the pendency of the litigation (Section 6213, Internal Revenue Code of 1954). Or the taxpayer can forego this prepayment remedy, pay the entire amount of the tax deficiency and sue for a refund in either the district court or the Court of Claims (28 U.S.C. 1346(a)(1); Sections 7422, 6511, 6532, Internal Revenue Code of 1954.) What the taxpayer cannot do is to forego his prescribed prepayment remedy in the Tax Court and then obtain district court review without first paying the tax deficiency in full.[4]

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[4] See Section 7421, Internal Revenue Code of 1954 (prohibiting suits to restrain the assessment or collection of any tax), 28 U.S.C. 2201 (forbidding any declaratory judgment action with respect to federal taxes), and *Flora* v. *United States*, 362 U.S. 145, 163, stating that "there is one tribunal for prepayment litigation [the Tax Court] and another for post-payment litigation [the district courts and the Court of Claims], with no room contemplated for a hybrid of the type proposed by petitioner."

Petitioner claims that 28 U.S.C. 2410 provides an exception to this "carefully articulated and quite complicated structure of tax laws" (362 U.S. at 157), so that by labeling his suit an action to quiet title under 28 U.S.C. 2410 a taxpayer may obtain (1) a district court review on the merits of his tax controversy without first paying the deficiency and (2) an injunction against the collection of the tax. Such an exception would, of course, swallow the rule laid down in *Flora* v. *United States, supra,* and frustrate the express statutory prohibitions against suits to enjoin the collection of taxes and against declaratory judgments with regard to federal taxes.[5]

As this Court has recognized (*United States* v. *Brosnan,* 363 U.S. 237, 244–246), Section 2410 was designed to give third parties who either had a lien upon or had purchased the taxpayer's property certain rights to litigate the standing of the federal government's lien. The legislative history of Section 2410 clearly shows that it was intended to serve this lim-

[5] See *Dodge* v. *Osborn,* 240 U.S. 118, 121–122, where this Court said that the anti-injunction statute could not be circumvented by a claim that the lien arising from the tax assessment "would constitute a cloud on the plaintiffs' title"; and *Great Lakes Co.* v. *Huffman,* 319 U.S. 293, where in a suit involving the statute prohibiting federal courts from enjoining State tax collections except under prescribed circumstances this Court observed (*id.* at 300) that "a declaratory judgment * * * is analogous to equity jurisdiction in suits *quia timet* or for a decree quieting title."

In fact, in both the district court and court of appeals petitioners claimed that the instant action came within the carefully proscribed exception to the no-injunction statute. See *Enochs* v. *Williams Packing & Navigation Co.,* 370 U.S. 1. Both lower courts rejected the claim and petitioner has now dropped it.

ited purpose and was not meant to eviscerate all of the remedies so "carefully articulated" (362 U.S. at 157) in the Code. All of the courts of appeals which have considered the question have so held. In *Falik* v. *United States*, 343 F. 2d 38 (C.A. 2) and *Quinn* v. *Hook*, 341 F. 2d 920 (C.A. 3), affirming *per curiam* 231 F. Supp. 718, as well as in the instant case, the courts of appeals held that the taxpayer could not use a suit to quiet title under Section 2410 to litigate the merits of his underlying tax deficiency. Nor has any court of appeals permitted a third party lienor or purchaser (*i.e.*, a person other than the taxpayer) to litigate the merits of an underlying deficiency.[6]

[6] In *Pipola* v. *Chicco*, 274 F. 2d 909 (C.A. 2), the court expressly held that a third party could not raise the merits in a Section 2410 suit; one of the grounds for this conclusion was subsequently withdrawn in *United States* v. *O'Connor*, 291 F. 2d 520 (C.A. 2), but the holding itself was reaffirmed in *Falik* v. *United States*, 343 F. 2d 38 (C.A. 2) (dicta). In *United States* v. *Morrison*, 247 F. 2d 285 (C.A. 5), involving a challenge by a third party, the court merely reviewed the priority of the liens without discussing the merits of the underlying tax deficiency, but remarked that the questions open on a Section 2410 proceeding also included whether "the Government has no lien because the property did not belong to the taxpayer, *the tax was not properly assessed*, or the lien was time barred" (*id.* at 290; emphasis added). It is not clear whether the italicized dicta referred only to the procedural steps in making an assessment or to the merits of the underlying deficiency as well. Both *Wells* v. *Long*, 162 F. 2d 842 (C.A. 9) and *Remis* v. *United States*, 273 F. 293 (C.A. 1) were dismissed for lack of federal jurisdiction without any consideration of whether the third party could raise the merits of the deficiency on which the lien was based. See also *United States* v. *Coson*, 286 F. 2d 453 (C.A. 9).

This case does not raise the question whether the taxpayer himself could ever use Section 2410 to quiet title to his property for reasons not relating to the merits of the underlying tax deficiency, such as when the taxpayer claims that the assessment has been discharged by payment. Nor does this case involve the question whether a third party lienor or purchaser (as contrasted with the taxpayer himself) can raise the merits of the underlying deficiency in a Section 2410 proceeding. The only question raised by the instant case is whether a taxpayer himself, having foregone his available prepayment remedy in the Tax Court, can (contrary to the holding in *Flora*) initiate judicial review on the merits of the deficiency (as well as obtain an injunction against collection) without first paying the tax in full. On none of these three questions is there any conflict in the decisions of the courts of appeals.[7]

[7] The three cases cited by petitioner stand for the proposition that the taxpayer can *defend* on the merits when the government seeks to use the courts to enforce and collect its tax assessment, *Clinkenbeard* v. *United States*, 21 Wall. 65; *United States* v. *Rindskopf*, 105 U.S. 418; *United States* v. *O'Connor*, 291 F. 2d 520 (C.A. 2), and are thus not relevant to the question at hand: The ways in which the taxpayer can *initiate* judicial review on the merits of his tax deficiency.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1965.

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